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Cutting edge employment law issues: Are these on your radar?

By Christina M. Coleman

A bad economy during a pandemic with a shortage of workers in a politically charged society creates the perfect storm of employment litigation. The past few years have demonstrated an explosion in employment litigation, in everything from ordinary wage and hour claims, whistleblower retaliation, and discrimination/harassment cases. The sheer volume of cases and increasing number of 7-, 8-, and even 9-figure jury verdicts evidences a lower level of employee and societal tolerance of workplace grievances, both small and large. Both plaintiff and defense employment attorneys should be aware of some of the newest and/or novel claims being asserted in the employment law area.

Take-home COVID litigation: In *See's Candies, Inc. v. Superior Ct. of California for Cnty. of Los Angeles*, 73 Cal.App.5th 66, California's 2nd District Court of Appeal upheld the viability of maintaining a civil action for wrongful death filed by employee and her children arising from the employee's husband's death from COVID-19 after the wife allegedly contracted the virus at work and infected her husband. The employee's claims for having contracted COVID-19 would have fallen under the exclusive jurisdiction of the Workers' Compensation Act, with no ability to pursue general damages in civil court for emotional distress, pain or suffering. The *See's Candies* case opens the door for employees and their family members to pursue claims against their employer on a negligence theory, including for negligent infliction of emotional distress, when the employee contracts COVID-19 due to the employer's negligence in failing to maintain or enforce adequate COVID-19 protocols, resulting in the employee's family members becoming infected. In a similar case, *Kuciemba v. Victory Woodworks, Inc.*, 31 F.4th 1268 (9th Cir. 2022), the 9th Circuit has certified to the California Supreme Court the question of whether the workers' compensation derivative injury doctrine barred an employee's spouse's claims against the employer for take-home COVID-19 and whether an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19. As of this article, the California Supreme Court has not accepted or rejected certification, so the question remains open, and See's Candies is the current law on this issue.

Workplace political activities are not protected: We currently live in a very politically charged society, not just as a result of who our elected leaders are and their policies, but also as a result of new Supreme Court precedent, not the least of which is the overturning of *Roe v. Wade*. Employers, employees and even employment lawyers wonder how the current climate of increased political discourse impacts or implicates the workplace and employment law. For the most part, workplace political activities are not protected. First, political affiliation is not a protected class under the Fair Employment and Housing Act subject to its anti-discrimination, harassment and retaliation laws. Govt. Code § 12940(a) [listing protected classes]. However, some political views are closely related to religious views, which are still protected. Similarly, persons who suffer a disability as a result of having had an abortion, e.g., a mother who experiences medical complications resulting from an abortion or needs an accommodation – such as taking time off from work to recover or a modification of job duties to address work restrictions like lifting or walking, – must be accommodated even if the employer opposes abortion. Second, the 1st Amendment right to free speech

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does not apply to private employers. *Grinzi v. San Diego Hospice Corp.*, 120 Cal.App.4th 72, 77 (2004) [1st Amendment applies only to government actions]. Private employers may control what topics are appropriate for their workplace. Third, Labor Code Sections 1101 and 1102 only prevent employers from preventing employees from engaging in political activities, including running for office and participating in political discussions, outside of work and/or retaliating against them for political views, but employers can make policies restricting any political chatter in the workplace, with violations of that policy constituting insubordination as opposed to based on political beliefs.

Reimbursing expenses of remote workers: With the unprecedented number of employees working remotely, employers must beware of liability for failure to reimburse employees for business expenses relating to remote work. Labor Code Section 2802 requires employers to reimburse their employees for actual necessary business expenses incurred in direct consequence of discharging the employee's duties. While employers have for years been reimbursing for things like mileage and cell phone use, employers are overlooking expenses unique to the remote worker, such as home internet connection, use of private cell phone (for those who did not previously use their cell phone for work), paper and printer toner, basic office supplies, a pro rata share of electricity and heat, even use of a personal computer if the company does not provide one. A violation of Section 2802 authorizes the award of reasonable costs and attorney's fees, in addition to the unpaid expenses, and these types of violations are highly amenable to class treatment, all of which greatly increases the exposure to the offending employer.

Retaliation for refusing to enter into arbitration agreements: On Jan. 1, 2021, Assembly Bill 51 was to go into effect which, among other things, was intended to make it unlawful to retaliate against employees or prospective employees who refuse to enter into arbitration agreements with an employer. Before it was set to take effect, the United States District Court for the Eastern District of California issued a temporary and then preliminary injunction enjoining enforcement of the law by certain public officials, on the grounds that it was likely preempted by the Federal Arbitration Act. The future of Assembly Bill 51 is very much in the air. The 9th Circuit in *Chamber of Com. of United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021), decided in Sept. 2021, concluded Assembly Bill 51 was not preempted to the extent it regulated an employer's conduct prior to executing an arbitration agreement, and the preliminary injunction issued by the district court was vacated. A petition for rehearing en banc was filed, which the 9th Circuit deferred pending the anticipated Supreme Court's ruling in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), concerning enforcement of arbitration agreements with PAGA waivers. On Aug. 22, 2022, instead of granting or denying the petition for rehearing, the 9th Circuit made a surprising decision to withdraw its prior panel opinion and dissent, and granted a panel rehearing in the *Bonta* case. There is speculation that this act is signaling that the 9th Circuit might conclude the Federal Arbitration Act preempts Assembly Bill 51 in its entirety. In the meantime, the Labor Commissioner currently takes the position that it may still enforce this law in cases involving (1) employment contracts for seamen, railroad employees, or workers engaged in foreign/interstate commerce, or (2) arbitration agreements that do not evidence a transaction involving interstate commerce. (See Laws that Prohibit Retaliation and Discrimination, State of California Department of Industrial Relations.)

Employment law is continually evolving, with new cases being decided and new statutes being enacted. Staying abreast of these cutting-edge employment issues is critical to identifying potential claims to pursue, or how to defend them.

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